



## **I. Introduction**

1. Physicians for Human Rights (PHR) is an international human rights organization registered in Kenya that uses science and medicine to document human rights violations and support accountability. PHR has worked with partners in Kenya for over 13 years to promote accountability and justice for survivors of sexual violence.
2. This submission highlights the critical issue of election-related sexual violence (ERSV) in the context of elections in Kenya, emphasizing the need for comprehensive frameworks to support survivors and ensure timely access to justice.

## **II. International Legal Framework**

3. Kenya has acceded to several human rights treaties that obligate the government to investigate, prosecute, punish, and provide remedy - including reparation - for sexual violence, and gender-based violence.<sup>1</sup> Relevant standards are stipulated in international and regional human rights treaties and conventions to which Kenya is a State Party, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), International Covenant on Civil and Political Rights (ICCPR), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Covenant on Economic, Social and Cultural Rights (ICESCR), African Charter on Human and People's Rights (ACHPR), and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol).
4. Kenya's human rights obligations continue to apply during periods of unrest or conflict.<sup>2</sup> In fact, electoral periods, which in Kenya are often marred by violence and repeated patterns of sexual violence, require a deliberate effort to implement State obligations with regard to ERSV. The CEDAW Committee in General Recommendation 35 has affirmed that "The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, to prosecute and punish perpetrators and to provide reparations to victims/survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women. Such failures or omissions constitute human rights violations."<sup>3</sup> States parties must ensure prompt, effective, and holistic reparations for survivors of gender-based violence that are proportionate to the gravity of the harm suffered.<sup>4</sup> Further, states parties must "establish specific funds for reparations or include allocations in the budgets of existing funds."<sup>5</sup>

## **III. National Framework**



5. The 2010 Constitution of Kenya outlines clear commitments of the state to comply with international law concerning the protection of human rights.<sup>6</sup> Articles 2 (5) and (6) provide that the general rules of international law as well as any treaty or convention ratified by Kenya form part of the law of Kenya.<sup>7</sup> Moreover, Article 21 (4) imposes obligations on the state to enact and implement legislation to “fulfil its international obligations in respect of human rights and fundamental freedoms.”<sup>8</sup> These three provisions may be interpreted to mean that international law is directly applicable by Kenyan courts, regardless of whether parliament has enacted specific legislation to incorporate the international laws in question.
6. The 2010 Constitution of Kenya further elaborates on positive duty of the State and all State organs to observe, respect, protect, promote, and fulfill the rights and fundamental freedoms outlined in the Bill of Rights. Articles 48 and 50 provide for the right to access to justice, including the right to a fair trial and to be brought before a court as soon as reasonably possible.<sup>9</sup> Survivors of sexual and gender-based violence in Kenya, however, have often experienced significant delays and barriers to accessing justice.
7. Kenya also has a clear obligation to address gaps and provide high quality, accessible, acceptable, and available mental health care. The Constitution of Kenya affirms that “every person has the right to the highest attainable standard of health.”<sup>10</sup> The Mental Health Amendment Act’s 2022 revisions state that survivors of sexual violence are entitled to access affordable mental health services in Kenyan health facilities.<sup>11</sup>
8. Kenya has enacted laws to comply with its international legal requirements to prevent and redress sexual violence. The Sexual Offences Act No.3 of 2006 outlines provisions for addressing sexual offenses by detailing standards for the collection and preservation of evidence, as well as the protection of witnesses. Article 31 notes that a court may designate an alleged victim in proceedings pending before the court or with other potential risk factors to be a “vulnerable witness,” and outlines clear steps for protections for such individuals. The Act also details specific procedures for the provision of a survivor-centered approach to collecting and documenting evidence and presenting the same in courts.<sup>12</sup>
9. To operationalize the Sexual Offences Act, the National Guidelines on the Management of Sexual Violence in Kenya serves as a guiding policy framework that sets out the essential procedures and services for management of survivors of sexual violence. The guidelines provide essential information on management of sexual violence in a multi-pronged manner. This includes providing medical practitioners with information on steps to take when treating a survivor of sexual violence, preservation of evidence for court use, provision of psychosocial support and other ethical issues related to managing health-related problems of sexual violence. The guidelines also provide for medico-legal documentation of these violations using a forensic document known as the Post-Rape Care Form.<sup>13</sup>



#### IV. Impunity for ERSV

10. ERSV is a form of sexual violence, including rape, gang rape, sexual assault, and defilement, that occurs during the electoral process and/or is intended to influence or achieve a specific end within an electoral process.<sup>14</sup> Since the early 1990s, Kenya has experienced a troubling history of violence and sexual violence during electoral periods with women and girls disproportionately affected. This violence often serves as a tool of intimidation and control, undermining democratic processes and violating the fundamental rights of individuals.<sup>15</sup>
11. Following the post-election violence in 2007 and 2008, the Commission of Inquiry into the Post-Election Violence (CIPEV), also known as the “Waki Commission” was founded to document deadly violence, political unrest, and serious human rights violations during the electoral process. The commission documented more than 1,000 deaths, mass displacement, and 900 cases of sexual violence committed by security agents, militia, groups, and civilians against men, boys, women, and girls.<sup>16</sup>
12. Accountability for perpetrators of ERSV remains a significant challenge in Kenya. There have been significant delays in justice processes, as highlighted in Petition 122 of 2013. In the Constitutional Petition No. 122 of 2013, eight individuals, two male and six females, who were subjected to sexual violence during the post-election violence in Kenya in 2007-2008, sought justice and reparation before the High Court of Kenya. On December 10, 2020, the High Court in Nairobi issued a landmark judgement finding the Kenyan government responsible for failure to protect, investigate, and prosecute these crimes. The High Court in Nairobi should be commended for its ruling in favor of four of eight survivor petitioners recognizing “failure to conduct independent and effective investigations and prosecutions of sexual and gender-based violence-related crimes during the post-election violence,” and each was awarded compensation of KES 4 million “for the violation of their constitutional rights.” However, four years later, compensation has not been delivered.<sup>17</sup> Further, the court failed to recognize the harms suffered by the other four survivor petitioners. In 2021, petitioners filed a partial appeal, asserting that a High Court decision failed to recognize the Government of Kenya’s responsibility to survivors previously denied redress for the state’s failure to protect them from sexual violence perpetrated by non-state actors.<sup>18</sup> The appellants also seek to hold the state accountable for failing to prevent or respond to post-election sexual violence perpetrated by ethnic militias and civilians - a risk of violence that was widely anticipated. However, the appeal remains pending, with the case only being mentioned for the first time in October 2024 after a three-year delay. Survivors have now waited 17 years for justice.
13. In the prior Universal Periodic Review of Kenya, the government committed to “intensify efforts to secure redress for survivors of sexual violence following the 2007 and 2017 presidential elections and establish mechanisms to ensure such crimes are never repeated.”<sup>19</sup> To meet these commitments, the government of



Kenya must ensure that justice is not only accessible but also timely. This includes strengthening the judicial system, expediting investigations, and prosecuting cases of sexual violence with rigor. Survivors must be assured that their complaints will be taken seriously and that they will receive justice without undue delay.

14. Further, payment of compensation and a positive decision in the appeal would also be a critical component of comprehensive efforts to end impunity for sexual violence generally in Kenya, and ultimately strengthening deterrence.

## **V. Widespread ongoing sexual violence**

15. Sexual violence remains an endemic problem for large portion of the Kenyan population. The Demographic and Health Survey of 2022 showed that 34 percent of women and girls aged from 15 to 19 have experienced physical violence at least once in their lifetime and 13 percent reported having experienced sexual violence, with many of these cases going unreported to authorities.<sup>20</sup> Political instability and poor enforcement of laws and policies were major contributors to the rise and certain regions were found to experience higher levels of violence than others.<sup>21</sup>
16. Sexual violence continues to be perpetuated with impunity during conflict and in conflict prone areas, causing increased mistrust in the criminal justice system for those who endure long waiting periods with no reparative measures from the government.<sup>22</sup> Survivors continue to face psychosocial trauma and socio-economic burdens on themselves and their families as a result of these ongoing violations.<sup>23</sup> These gaps are also attributed to the inadequate allocation of resources to effectively prevent, mitigate and respond to sexual violence meeting the needs of survivors.
17. Currently, the judiciary has set up specialized courts to enable the fast-tracking of sexual and gender-based violence cases. There is now a total of 10 of these “Gender Justice Courts” across the country, first launched in March 2022, with an urgent need for additional courts in other counties.

## **VI. Access to Health Care and Legal Services**

18. Article 12 of CEDAW obliges state parties to ensure access to health care for women, which includes comprehensive services for survivors of sexual violence.<sup>24</sup> However, survivors of conflict-related sexual violence in Kenya face numerous barriers in accessing health care, including stigma, lack of information, and inadequate services.<sup>25</sup>
19. One of the barriers that survivors face is inadequate access to mental health care. In July 2022, President Uhuru Kenyatta signed the Mental Health Amendment Act (2022) into law. The Act’s 2022 revisions of the previous legislation - the Mental Health Act (1991) - recognize the right to mental health in Kenya and



provide a framework for delivery of mental health services. The Act also provides a framework that entitles survivors of sexual violence to access affordable mental health services in Kenyan health facilities.<sup>26</sup>

20. Despite this robust framework, there remain gaps in its implementation regarding allocating sufficient resources for the provision of quality mental health care, strengthening community-based mental health care and support, and instituting mental health councils.<sup>27</sup> The Kenyan government must establish and fund survivor-centered health care services, including mental health support, legal assistance, and emergency medical care. Furthermore, these services should be made widely accessible, especially in conflict prone areas, where violence is prevalent.
21. Survivors' access to services and justice has also been deterred by a lack of trained service providers within the criminal justice system. Insufficient requisite skills to work with survivors of sexual violence and to effectively manage forensic evidence directly affects the quality of investigations and accountability for these crimes. There currently exist gaps in the pre-service training of health professionals, especially in the provision of survivor-centered and trauma-informed forensic services to survivors of sexual violence, including forensic documentation. The Ministry of Health and devolved Counties should provide mandatory training for service providers to fully incorporate these approaches in service provision.
22. Laws aimed at improving investigations of sexual violence have seen limited impact, due to gaps in their operationalization. For example, the Legal Aid Act No. 6 of 2016 states that access to justice for those who are not able to afford legal services needs to be facilitated by the state through legal assistance, drafting of legal documents and legal advice, but is yet to be fully implemented.<sup>28</sup> Services have only been devolved to five counties through the established National Legal Aid Service to ensure implementation of the Legal Aid Act.<sup>29</sup>
23. The existing mechanisms for reporting incidents of sexual violence are insufficient and often deter survivors from coming forward, especially if the alleged perpetrators are state security actors. There are gaps noted in the safety and confidentiality of the reporting processes including inadequate technical capacity and skills within reporting agencies to support survivor-centered investigations of ERSV.<sup>30</sup> The Kenyan government must create safe and confidential reporting mechanisms that prioritize the needs and safety of survivors. This includes training law enforcement and judicial personnel to better respond to these cases of sexual violence and in alignment with the guidelines set forth in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>31</sup>
24. It is important to note that through the National Council on the Administration of Justice, there are Court Users' Committees<sup>32</sup> that have been cascaded up to the Sub-County level that bring together stakeholders such as the



Ministry of Health, Ministry of Interior, Judiciary, administrative officers, and civil society organizations. These multisectoral committees have in some counties succeeded in the implementation of key policies to ease the burden on survivors as they access urgent care and justice. These committees, however, need to be adopted across all counties and funded sufficiently.

## **VII. Recommendations for the Kenyan government:**

- a. In February 2013, six women and two men survivors of the 2007/2008 ERSV filed petition 122 of 2013 at the Constitutional and Human Rights Division of the High Court of Kenya. The eight survivor-petitioners represented different types of sexual violence that occurred during that period. The petitioners stated that the Government of Kenya failed to fulfil its human rights obligations as per the Constitution of Kenya and other regional and international human rights instruments. In a landmark judgement, on 10 December 2020, the High Court of Kenya at Nairobi ruled in favor of four of the eight survivor-petitioners. We commend the High Court on this judgment, for recognizing the states duty to investigate and prosecute SGBV related crimes and that sexual violence constitutes a form torture. However, there have been significant delays in issuing the reparations awarded in the judgment. The Government needs to prioritize reparations, compensation and remediation for survivors of ERSV to restore survivors' dignity and ensure accountability for perpetrators.
- b. Furthermore, we call for an expedition in the hearing of appeal E645 of 2021 that was filed to partially appeal the judgement made on petition 122 of 2014. The appeal asserts that the lower court failed to recognize the Government of Kenya's responsibility to ERSV survivors who were previously denied redress for the state's failure to protect them from sexual violence perpetrated by non-state actors.
- c. Fully operationalize comprehensive survivor-centered services in every county that include health, justice, security, and safety services. This includes mandatory training of service providers to fully incorporate survivor-centered and trauma-informed approaches and the creation of safe and confidential mechanisms for reporting incidents of ERSV.
- d. In line with the Sexual Offenses Act Medical Treatment Regulations, the National Guidelines on Management of Sexual Violence in Kenya, and the Mental Health (Amendment Act) there needs to be allocation of health funds





to guarantee no-cost post-rape care and affordable mental health care for priority populations.

- e. Full implementation of the Legal Aid Act to ensure that the State facilitates the required legal assistance including the drafting of legal documents, legal advice, and coordination with other legal services.

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<sup>1</sup> See, e.g., United Nations General Assembly. “Convention on the Elimination of All Forms of Discrimination against Women (A/RES/34/180) Adopted December 18, 1979; Committee on the Elimination of Discrimination against Women; Rome Statute of the International Criminal Court Done at Rome on July 17, 1998, in force on July 1, 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depository: Secretary-General of the United Nations, <http://treaties.un.org>.

<sup>2</sup> Committee on the Elimination of Discrimination against Women, General Recommendation 28.

<sup>3</sup> Committee on the Elimination of Discrimination against Women, General Recommendation 35, para. 24(b).

<sup>4</sup> Committee on the Elimination of Discrimination against Women, General Recommendation 35, para. 33(a).

<sup>5</sup> Committee on the Elimination of Discrimination against Women, General Recommendation 35, para. 33(b).

<sup>6</sup> “Constitution of Kenya,” *Kenya Gazette* CXII, No.88 (September 3, 2010), [https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03#chp\\_ONE](https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03#chp_ONE).

<sup>7</sup> *Ibid*, Article 2.

<sup>8</sup> *Ibid*, Article 21(4).

<sup>9</sup> Constitution of Kenya,” Article 48, 50.

<sup>10</sup> *Ibid*, Article 43 (1).

<sup>11</sup> “Mental Health (Amendment) Act” *Kenya Gazette*, June 27, 2022, [https://nisisikenya.org/wp-content/uploads/2023/11/TheMentalHealth\\_Amendment\\_Act\\_2022.pdf](https://nisisikenya.org/wp-content/uploads/2023/11/TheMentalHealth_Amendment_Act_2022.pdf).

<sup>12</sup> “The Sexual offences Act No. 3 of 2006,” National Council for Law Reporting with the Authority of the Attorney General, July 21, 2006, <https://probation.go.ke/sites/default/files/downloads/The%20Sexual%20Offences%20Act%20No%203%20of%202006.pdf>.

<sup>13</sup> “Post Rape Care Form (PRC) MOH 363: Part A & B,” Ministry of Health of Kenya, accessed October 10, 2024, [https://www.law.berkeley.edu/wp-content/uploads/2015/10/Kenya\\_Ministry-of-Health\\_Post-Rape-Care-PRC-Form.pdf](https://www.law.berkeley.edu/wp-content/uploads/2015/10/Kenya_Ministry-of-Health_Post-Rape-Care-PRC-Form.pdf).

<sup>14</sup> “The Sexual offences Act No. 3 of 2006,” <https://probation.go.ke/sites/default/files/downloads/The%20Sexual%20Offences%20Act%20No%203%20of%202006.pdf>.

<sup>15</sup> “Breaking Cycles of Violence: Gaps in Prevention of and Response to Electoral-Related Sexual Violence in Kenya” December 17, 2019, <https://phr.org/our-work/resources/breaking-cycles-of-violence-gaps-in-prevention-of-and-response-to-electoral-related-sexual-violence-in-kenya/>.

<sup>16</sup> “Final report of the *Commission of Inquiry into the Post-Election Violence*,” October 16, 2008, 237-268, <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report>.

<sup>17</sup> Constitutional Petition No. 122 Seeks to hold the Kenyan Government Accountable for Sexual Violence in the Post-Election Period,” Physicians for Human Rights, September 21, 2019, <https://phr.org/issues/sexual-violence/program-on-sexual-violence-in-conflict-zones/advocacy/public-interest-litigation/>.

<sup>18</sup> “Survivors of Post-Election Sexual Violence in Kenya Appeal Elements of Recent Ruling, Seek Justice and Redress for All Survivor-Petitioners,” Physicians for Human Rights, November 11, 2021, <https://phr.org/news/survivors-of-post-election-sexual-violence-in-kenya-appeal-elements-of-recent-ruling-seek-justice-and-redress-for-all-survivor-petitioners/>.

<sup>19</sup> “Universal Periodic Review of Kenya, 3rd Cycle,” United Nations Human Rights Council, January 23, 2020, Recommendation 142.136.

<sup>20</sup> “Demographic and Health Survey: Key Indicators Report,” Kenya National Bureau of Statistics, Ministry of Health, and The DHS Program, January 2023, <https://dhsprogram.com/pubs/pdf/PR143/PR143.pdf>.

<sup>21</sup> *Ibid*.

<sup>22</sup> “Breaking Cycles of Violence: Gaps in Prevention of and Response to Electoral-Related Sexual Violence in Kenya” December 17, 2019, <https://phr.org/our-work/resources/breaking-cycles-of-violence-gaps-in-prevention-of-and-response-to-electoral-related-sexual-violence-in-kenya/>.



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- <sup>23</sup> Kenya Study on the Opportunity for Reparations for Survivors of Conflict Related Sexual Violence, May 2023, [https://www.globalsurvivorsfund.org/fileadmin/uploads/gsf/Documents/Resources/Global\\_Reparation\\_Studies/GSF\\_Report\\_KENYA\\_EN\\_May2023\\_WEB.pdf](https://www.globalsurvivorsfund.org/fileadmin/uploads/gsf/Documents/Resources/Global_Reparation_Studies/GSF_Report_KENYA_EN_May2023_WEB.pdf).
- <sup>24</sup> United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. A/RES/34/180 (December 18, 1979), <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>.
- <sup>25</sup> “Voicing Our Plight” June 6, 2023. <https://phr.org/our-work/resources/voicing-our-plight-kenya-photovoice/>.
- <sup>26</sup> “Mental Health (Amendment) Act.”
- <sup>27</sup> “Voicing Our Plight” June 6, 2023. <https://phr.org/our-work/resources/voicing-our-plight-kenya-photovoice/>.
- <sup>28</sup> “The Legal Aid Act: Chapter 16A,” National Council for Law Reporting, 2022, <http://www.kenyalaw.org:8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/L/ Legal%20Aid%20Act%20-%20No.%206%20of%202016/docs/LegalAidAct6of2016.pdf>.
- <sup>29</sup> Wycliff Nyakundi Nyamo, “Support to the National Legal Aid Service of the Office of the Attorney General and Department of Justice Under the Programme for Legal Empowerment and Aid Delivery,” National Legal Aid Service (January – March 2023): 33, [https://www.nlas.go.ke/sites/default/files/2024-06/Final%20Mapping%20Report\\_1%20%281%29.pdf](https://www.nlas.go.ke/sites/default/files/2024-06/Final%20Mapping%20Report_1%20%281%29.pdf).
- <sup>30</sup> “Breaking Cycles of Violence: Gaps in Prevention of and Response to Electoral-Related Sexual Violence in Kenya” December 17, 2019, <https://phr.org/our-work/resources/breaking-cycles-of-violence-gaps-in-prevention-of-and-response-to-electoral-related-sexual-violence-in-kenya/>.
- <sup>31</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [https://au.int/sites/default/files/treaties/37077-treaty-charter\\_on\\_rights\\_of\\_women\\_in\\_africa.pdf](https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf).
- <sup>32</sup> Court Users’ Committees Guidelines, [https://www.unodc.org/documents/easternafrika/Criminal%20Justice/CUC\\_GUIDLINES\\_2019\\_final.pdf](https://www.unodc.org/documents/easternafrika/Criminal%20Justice/CUC_GUIDLINES_2019_final.pdf).